Filed 2/1/19 In re O.R. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re O.R., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.C., Defendant and Appellant; T.R., a Minor, etc. et al., Objectors and Appellants.	E071144 (Super.Ct.No. J265598) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Conditionally reversed with directions.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant.

Joseph T. Tavano, under appointment by the Court of Appeal, for Objectors and Appellants.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, L.C. (Mother), is the mother of O.R., a child born in April 2013. Objectors and appellants, K.R. (born in 2006) and T.R. (born in 2010), are Mother's older children and O.R.'s half siblings. Mother, K.R., and T.R. appeal from the August 16, 2018, order terminating parental rights to O.R. (Welf. & Inst. Code, § 366.26.)[1]

Mother claims the Welfare and Institutions Code section 366.26 order must be reversed because the juvenile court and plaintiff and respondent, San Bernardino County Children and Family Services (CFS), failed to give adequate notice of the proceedings pursuant to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related California law (Welf. & Inst. Code, §§ 224.2, 224.3). T.R. and K.R. join this claim, and CFS and we agree it has merit. The ICWA notices did not include known identifying information concerning O.R.'s maternal great-grandmother (the MGGM), including her names, approximate dates of birth and death, and a partial address. (Welf. & Inst. Code, § 224.2, subd. (a)(5).) T.R. and K.R. also claim the juvenile court abused its discretion in

[1] Undesignated statutory references are to the Welfare and Institutions Code unless otherwise indicated.

determining that the sibling relationship exception to adoption did not apply. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(v).) On this point, we find no abuse of discretion. We conditionally reverse the August 16, 2018, order terminating parental rights, pending the juvenile court's compliance with the inquiry and notice requirements of ICWA and related California law. In all other respects, we affirm the judgment.

II. FACTS AND PROCEDURE

O.R. came to CFS's attention in May 2016 when she was three years old. On May 19, Mother's spouse, N., physically abused O.R., and locked O.R. in a storage locker for several hours when it was very cold outside. N. was arrested and charged with willful cruelty to O.R.[2] Mother and N. were married but did not live together, and they gave conflicting stories concerning which of them was primarily caring for O.R. K.R. and T.R. were living with Mother. Mother would not identify any of the children's biological fathers, and both Mother and N. claimed all three children as their own.

CFS filed section 300 petitions for all three children. On May 25, 2016, the children were ordered detained, but O.R. was released to Mother under CFS supervision and on the condition she not allow N. to have contact with O.R. outside CFS supervision. By June 15, the whereabouts of Mother and the children were unknown, and Mother was in violation of the May 25 detention orders. The maternal grandmother (MGM) reported Mother may have gone to Las Vegas with the children and Mother was "a drug addict and prostitute" who allowed N. to physically abuse her. CFS also reported that Mother

[2] N. is not a party to this appeal.

and N. had histories of leading transient lifestyles, homelessness, prostitution, drug use, and domestic violence.

On August 7, 2016, the children were found abandoned in Victorville after they had spent the night unattended in a shopping cart behind a fast food restaurant near a trash dumpster. In the morning, K.R. went to a nearby store, crying and upset. K.R. later reported that N. had left the children in the shopping cart, saying she would return, but she never did. K.R. did not know where Mother was during the night, but knew she had been at the fast food restaurant "'waiting for a friend.'" T.R. gave the same account of the incident. O.R. was too young to recall being left in the shopping cart. Mother was arrested and pled guilty to one count of willful cruelty to a child (Pen. Code, § 273a, subd. (b)) and was granted probation.

On November 15, 2016, the court sustained multiple amended jurisdictional allegations for the children (§ 300) and set a contested dispositional hearing. On December 5, 2016, the court adjudicated the children dependents, ordered them removed from parental custody, and denied reunification services and visitation to both Mother and N. (§ 361.5, subd. (b)(1), (6), (9), (15).) Selection and implementation hearings were set for all three children. (§ 366.26.)

In April 2017, CFS reported that K.R. and T.R. were having severe behavioral problems, all three children were in separate foster homes, T.R. was in a group home, and the children were visiting each other monthly. In August 2017, the court selected

permanent planned living arrangements as each child's permanent plan, with the goal of legal guardianship for K.R., a lower level of care for T.R., and adoption for O.R.

In February 2018, CFS reported the children continued to visit each other monthly and had more frequent phone contact. K.R. and T.R. continued to struggle with "defiant behaviors," including lying, stealing, and acting aggressively toward peers. O.R. was doing well in her placement with nonrelative extended family members (NREFM's) with whom she had been living since November 2017. O.R. was bonded to her NREFM's and they wanted to adopt her. Thus, CFS recommended changing O.R.'s permanent plan to adoption. On February 8, 2018, the court set a further section 366.26 hearing to determine whether to change O.R.'s permanent plan to adoption. At that point, Minors' counsel declared a conflict of interest in representing all three children, and the court appointed two counsel, one for O.R. and one for K.R. and T.R.

At an August 16, 2018, section 366.26 hearing, the court terminated parental rights to O.R. and changed her permanent plan to adoption. By this time, O.R.'s NREFM's had become her prospective adoptive parents (PAP's) (§ 366.26, subd. (n)), and O.R. was "excited" about being adopted by them. O.R. was still visiting K.R. and T.R. on a monthly basis and speaking to them by phone between visits. T.R. supported O.R.'s adoption, but K.R. was unsure whether she wanted O.R. to be adopted.

K.R. testified that she and T.R. lived with O.R. until O.R. was age two, and the children spent their first several months in foster care together. Mother and N.'s counsel asked the court to apply the sibling relationship exception to adoption. (§ 366.26, subd.

(c)(1)(B)(v).) Counsel for K.R. and T.R. agreed that the exception applied, and also claimed it would be detrimental to O.R. to break her sibling bonds with K.R. and T.R. Counsel for O.R. argued the exception did not apply because O.R. understood adoption and wanted her PAP's to adopt her even though she had a "good relationship" with K.R. and T.R. At the conclusion of the hearing, the court found O.R was both generally and specifically adoptable, adoption was in O.R.'s best interests, and breaking her sibling bonds with K.R. and T.R. would not be detrimental to O.R. As noted, Mother, K.R., and T.R. appeal from the August 16, 2018, order terminating parental rights to O.R.

III. DISCUSSION

A. *The Juvenile Court Properly Determined that the Sibling Relationship Exception to the Adoption Preference Did Not Apply to O.R.*

K.R. and T.R. claim the juvenile court erroneously determined that the sibling relationship exception to adoption did not apply in O.R.'s case. We disagree.

At the section 366.26 hearing, the juvenile court must choose a permanent plan for the child, and adoption is the Legislature's preferred permanent plan. (*In re I.R.* (2014) 226 Cal.App.4th 201, 211.) If the court finds the child is adoptable, it must terminate parental rights and select adoption as the child's permanent plan, unless it finds that terminating parental rights would be detrimental to the child under at least one of several statutory exceptions to adoption. (*Id.* at pp. 211-212; § 366.26, subd. (c)(1)(B).)

By its terms, the sibling relationship exception applies only when "[t]here would be substantial interference with a child's sibling relationship, taking into consideration

the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

"Reflecting the Legislature's preference for adoption when possible, the 'sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a "compelling reason" for concluding that the termination of parental rights would be "detrimental" to the child due to "substantial interference" with a sibling relationship.' [Citation.] Indeed, even if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption. [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 61.) "[T]he ultimate question is whether adoption would be detrimental to the adoptive child, not someone else." (*Id*. at p. 55.)

In reviewing a challenge to a juvenile court's decision to apply or not apply the sibling relationship exception, we employ two possible standards of review, depending on the nature of the challenge. (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080.) We apply the substantial evidence standard in evaluating the court's factual findings, such as

whether the child has a close and strong bond with a sibling, but we apply the abuse of discretion standard in evaluating the court's discretionary determinations, such as whether there is a compelling reason for determining that terminating parental rights would be detrimental to the child. (*Ibid*.) Both standards of review call for a high degree of deference to the juvenile court. (*Ibid*.)

K.R. and T.R. argue "it was clear" that O.R. shared a "significant relationship" with them, especially with K.R. But this point was not disputed, and the court did not make a contrary finding. Rather, the court found that breaking her sibling bonds with K.R. and T.R. would not be detrimental to O.R., and adoption was in her best interest. Thus, the court implicitly determined that O.R. would benefit more from being adopted than she would benefit by maintaining her sibling relationships with K.R. and T.R. (*In re Celine R., supra*, 31 Cal.4th at p. 61.) In making this discretionary determination, the court did not abuse its discretion.

To be sure, the children shared some common experiences. They lived together, at least intermittently, until they were found abandoned together in Victorville in August 2016, when O.R. was age three, K.R. was nearly age nine, and T.R. was age six. After the children were moved to separate foster homes, they visited each other monthly and had more frequent phone contact.

But by the time of the August 16, 2018, section 366.26 hearing, the children had not lived together for nearly two years, and O.R. had been living with her PAP's since November 2017. Moreover, O.R. was five years old, understood adoption, and wanted

her PAP's to adopt her. Thus, even if adoption would substantially interfere with or even mean the end of O.R.'s sibling relationship with K.R. and T.R., the juvenile court did not abuse its discretion in determining that the sibling relationship exception did not apply.

B. *The Judgment Must Be Conditionally Reversed Pending Full ICWA Compliance*

Mother claims the juvenile court reversibly erred in terminating parental rights to O.R. because CFS's ICWA notices omitted known identifying information concerning O.R.'s great-grandmother, the MGGM. K.R. and T.R. join this claim. CFS and we agree the claim has merit.

1. Relevant Background

At the May 25, 2016, detention hearing, Mother completed a parental notification of Indian status form (ICWA-020) stating she may have "Cherokee" ancestry. In response to the court's questions at the hearing, Mother said her Cherokee ancestry was through her "full-blooded" great-grandmother, O.R.'s great-great-grandmother. Mother said she did not know her great-grandmother's name or whether she was enrolled in a tribe, but the name of Mother's grandmother, the MGGM, was Juanita Johnson, who was born on November 18, 1929, and grew up in Prentiss, Mississippi. The MGM later told CFS that the MGGM was a Cherokee; her name was Juanita *McGhee*; she was born in 1930, died in February 2009, and was from Prentiss, Mississippi. Neither Mother nor the MGM provided any additional identifying information concerning O.R.'s maternal ancestry. But the record does not show what, if any, other steps CFS took to inquire of

Mother, the MGM, or any other persons, concerning O.R.'s possible maternal Indian ancestry.

On November 30, 2016, CFS filed an ICWA declaration of due diligence for O.R. showing that, on November 18, CFS sent notices by certified mail, return receipts requested, of the December 2, 2016, dispositional hearing to the Bureau of Indian Affairs, the Secretary of the Interior, and to three federally-recognized Cherokee tribes—the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians (the Eastern Band), and the United Keetoowah Band of Cherokee Indians in Oklahoma (the Keetoowah Band). The ICWA notices included form ICWA-030 (notice of child custody proceeding for Indian child), which, as Mother points out, listed *no identifying information* concerning the MGGM, despite the identifying information for the MGGM provided by both Mother and the MGM.

On January 18, 2017, CFS filed a second ICWA declaration of due diligence along with copies of the signed certified mail receipts and correspondence CFS had received from the Cherokee tribes. In a letter dated December 21, 2016, the Cherokee Nation requested the complete name and date of birth of O.R.'s biological father, but, as indicated, Mother had refused to provide that information to CFS. In a letter dated December 6, 2016, the Eastern Band responded that O.R. was not an Indian child, based on the information provided, and in a letter dated November 29, 2016, the Keetowah Band stated it would not intervene in the proceedings because there was no evidence O.R. was descended from anyone on the Keetoowah roll.

On April 4, 2017, CFS filed a "Final" ICWA declaration of due diligence, showing it had responded to the Cherokee Nation's December 21, 2016, letter and gave the tribe "no additional" information. In a letter dated January 27, 2017, the Cherokee Nation advised CFS that it had closed its ICWA inquiry for O.R. Thus, on April 4, the court found ICWA did not apply and no further ICWA notices were required to be given.

2. Analysis

In a dependency proceeding, "where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a).) ICWA notices must also be sent (1) to the Bureau of Indian Affairs, if the identity of the child's tribe cannot be determined (25 U.S.C. §§ 1903(11), 1912(a)); and (2) "directly" to the Secretary of the Interior, unless the Secretary has waived notice in writing (Welf. & Inst. Code, § 224.2, subd. (a)(4); *In re Michael V.* (2016) 3 Cal.App.5th 225, 232).

"An ICWA notice must include, among other things, (1) the [possible] Indian child's name, birthdate, and birthplace, if known; (2) the name of the Indian tribe in which the child is a member or may be eligible for membership, if known; and (3) specific identifying information concerning the child's lineal ancestors, including '[a]ll names known of the Indian child's biological parents, grandparents, and great-

grandparents . . . including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' (§ 224.2, subd. (a)(5)(A)-(C).)" (*In re N.G.* (2018) 27 Cal.App.5th 474, 480.)

As Mother points out and as CFS concedes, the ICWA notices for O.R. were deficient because they omitted known identifying information concerning the MGGM: her names (Juanita Johnson aka Juanita McGhee), her date or approximate date of birth (Nov. 18, 1929 or 1930), her approximate date of death (Feb. 2009), and a partial former address (Prentiss, Mississippi). As we have explained, all of this information was known to CFS on or shortly after May 25, 2016, *and before* the ICWA notices were given.

For guidance to the juvenile court and CFS on remand, we further observe that an ICWA notice is *also* required to include known identifying information concerning the possible Indian child's great-great-grandparents and even older lineal ancestors (25 C.F.R. § 23.111(d) (2018)), particularly when there is no indication that the child's tribe or potential tribe has a blood-quantum requirement for membership (*In re N.G.*, *supra*, 27 Cal.App.5th at pp. 480-481).

Courts and child protective services agencies also have "an affirmative and continuing duty to inquire" whether a child for whom a section 300 petition is to be filed or has been filed is or may be an Indian child, if the child is in foster care or at risk of entering foster care. (§ 224.3, subd. (a).) And the burden of coming forward with information to determine whether a child is or may be an Indian child "does not rest

entirely—or even primarily—on the child and his or her family." (*In re Michael V.*, *supra*, 3 Cal.App.5th at p. 233.) To the contrary, if, as here, the court or social worker "knows or has reason to know" the child is or may be an Indian child, the social worker has a duty to "interview[] the parents, Indian custodian, and extended family members" and "any other person that reasonably can be expected to have information regarding the child's membership status or eligibility" in order to "gather the information required" in section 224.2, subdivision (a)(5). (§ 224.3, subd. (c); *In re K.R.* (2018) 20 Cal.App.5th 701, 706; Cal. Rules of Court, rule 5.481(a)(4)(A).)

IV. DISPOSITION

The August 16, 2018, order terminating parental rights to O.R. is conditionally reversed. The matter is remanded to the juvenile court with directions to comply with the inquiry and notice requirements of ICWA and California law, consistent with this opinion. If, after receiving the new ICWA notices, no tribe intervenes, then the order terminating parental rights shall immediately be reinstated. If, on the other hand, any tribe determines O.R. is an Indian child, the juvenile court shall proceed accordingly.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.